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## THE ORIGIN OF PUNISHMENT.

ELLSWORTH FARIS.

THE following discussion of the origin of punishment is undertaken with a view of obtaining some light on a difficult subject by means of the genetic method of approach. Our institutions are so complex and our tendency to idealize the existent is so inveterate that we are driven from one theory of punishment to another in the effort to justify what may, perhaps, have no real justification.

It is believed that a clear statement of the origin of punishment will throw some light on the nature of the punishing attitude and in a subsequent article the effort will be made to state the psychological corollary of the view here advanced.

Punishment is nowhere regarded as a specific instinct. It is not a part of the "original nature of man." Its manifestations grow out of the instinct of pugnacity and its accompaniment, the emotion of anger. But even these instinctive reactions are not themselves simple and direct, but are, in their turn, dependent on the thwarting of other instincts and impulses. Fighting and anger are social in their nature, requiring for their arousal, the presence of another animal of the same or related species which enters into some sort of competition or opposition and attempts to check the carrying out of any one of the stronger impulses.<sup>1</sup> Hunger, thirst, the desire for the possession of any object, or the sex instinct, can, most obviously, be the occasion of the arousal of the fighting reaction if a sufficiently serious check is encountered.

But the fighting reaction is not punishment. There is a popular use of the word in which one prize-fighter is said to receive "punishment" from the other, and the "natural punishments" are referred to by Herbert Spencer, but for

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<sup>1</sup> MacDougall: "Social Psychology," p. 59.

such uses of the term there is only a metaphorical justification. Neither combat nor calamity is sufficiently social in character to deserve the designation of punishment.

The common statement is that punishment is derived from this feeling of anger and reaction of fighting in a direct fashion. MacDougall,<sup>2</sup> for example, follows Laing in deriving the whole punitive situation from the "primal law" which is thought of as arising out of a situation within a small tribe of kinsmen in which the patriarch, who wished to have control of the females of the group, drove off the younger males of the tribe as they grew up and forced those who remained to submit to his direction and control. The result of disregarding these directions was, in every case, punishment by the patriarch, who might go to any length until submission was reached. In short, punishment is held to follow directly upon the opposition, by any one, to the operations of the sex instinct.

The same general notion appears in Pollock and Maitland,<sup>3</sup> in which the original situation is described as one in which each member of the group was his own avenger and the position defended that punishment follows directly upon the opposition of any member of the group to the serious purposes and plans of another. Naturally, the place for the origin of the institution of punishment will, accordingly, be found in the tribe. An eye for an eye and a tooth for a tooth is held to be the natural and normal way in which a member of the group answers the action of another in opposing his acts.

The analogy which suggested this theory is, as will be readily seen, the phenomena of struggle for leadership that occurs occasionally among gregarious animals. Rival candidates for the leadership of a herd of elephants have been observed to fight desperately, and the defeated one wanders off to lead a life of comparative solitude as a "rogue." But it is not difficult to see that such an effort

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<sup>2</sup> "Social Psychology," p. 282.

<sup>3</sup> "History of the English Law."

to banish one member of the group is a very different sort of undertaking from the normal punitive situation. In fact, there is very little resemblance between a duel to the death and any normal procedure of punishment. In punishment there is an endeavor to be fair and just to which the old account does not do justice. There is, even in extreme punishments, a mental measurement of the offence with the penalty and some rough equation results. But in the "primal law" situation, there is only the deadly struggle between infuriated and excited rivals.

### I.

There is abundant reason for questioning whether any one inside the primitive group was ever punished, at least by those within his own tribe. In an instinctive way the members of the group are bound together and in the most homogeneous groups they do not punish each other. Present-day people of some uncivilized tribes do not punish their children. The writer, during a residence of several years among the Bantus of the upper Congo river, in which time the people were under constant observation, failed to observe a single case of the punishment of a child. This is not a deliberate or reflective process, but rather an instinctive and uncritical one. The child in a small community that is homogeneous and in a situation where outside influences do not penetrate, will find himself fitting in to the social situation where he grows up and is without the stimulus to commit acts of an anti-social character.

And when, by any chance, such an act is committed, it is highly improbable that it will arouse any resentment whatever; in the event that it does, there is no remedy, and the tribe simply does nothing save where the offence is so serious as to break all bounds. The situation is analogous to that in which one breaks or damages his own property by accident; it is regrettable, but there is no remedy save an imprecation. It is impossible for some people to thrust a knife into their own flesh for, in some way, the weapon refuses to enter. The primitive tribe is a unit in just as

real a sense. Every member is to be credited with the good deeds of the whole and to be blamed to the faults of any one. Expulsion from the tribe in extreme cases might take place.

The Congo State government in the old days was never at a loss in the effort to apprehend criminals, for while the direct pursuit of a native in the forest would be like trying to overtake an antelope, such a chase is quite unnecessary. The tribe is a unit to such an extent that it is only necessary to send to the village for the chief, whose dignity will not permit him to flee in any ordinary emergency, and to cause the arrest and detention of this chief, if necessary, after which the man who is wanted always comes in voluntarily and surrenders. The only alternative to doing so would be to leave the country entirely; for existence would be unbearable with the head of the tribe in bondage on account of the offending member's failure to give himself up.

The point in this connection is that physical force is not the means of securing this supreme degree of sociality which will lead a man to give himself up to a fate that is desperate in the extreme. The earlier theories on this point are probably erroneous. The typical group control did not depend on force. The fact that the military leader of a war-like people was often, perhaps usually, a man of great strength, has led to the totally unwarranted inference that the rule was to the one who was physically the strongest. The savage is very ready to admire physical strength, but the leadership of one who is physically strong will not depend on this fact entirely or chiefly. He who rules must do so on account of some measure of wisdom in ruling and on account of the support he has from the loyalty of the rest of the group. Achilles is the greatest warrior among the besiegers, but the leadership lies not with him who sulks in his tent or who is indifferent to the death of his own people in unequal strife. Those who have assigned the dominant part in early group control to force, physically understood, have failed to understand that the sneer and

scorn of those within our own group are infinitely more powerful forces.

An incident personally observed on the Upper Congo river illustrates quite adequately the part played by public opinion in group control. A gigantic young warrior, under the influence of foreign and alien ideas, which were beginning to appear in the community following the European occupation, violated some minor point in the native system of taboos and was quite unrepentant when attention was called to it. The matter came to the attention of the oldest woman of the tribe who set out at once in indignation to find him. He hurried off to his hut, but she followed him to the very door, uttering all the while a stream of indignant protest to which the man vainly attempted to respond, but without opportunity of interrupting the unbroken course of her invective. He went into his hut and she crouched at the door; he retreated into the inner room, but she only raised her voice. The end of the unequal contest was reached when he came to the door, hesitated a moment, and then ran off into the forest, leaving the field to the victor. But the victor was a woman nearly a hundred years old, gray-haired, toothless, shrunken and lean, so frail that a blow from the fist of the warrior would have crushed her skull. She was the incarnation of public opinion and there was more power in her voice than in his muscle. Nor would it be just to say that it was his fear of the consequences which restrained him from resorting to force to rid himself of the troublesome adversary. The fact is that the force of the expressed common will is so strong that it does not occur to the individual to contest it. Obedience is unreflective and almost instinctive. For just as the parental instinct urges the mother to care for her child, so the child's instinct impels him to respond to the mother. And there is no need to explain why the child obeys the mother, the phenomenon requiring explanation being the failure on the part of the child to respond, when this does occur.

It seems clear to the writer that the explanation of the

tension and friction in modern groups, including family groups, is most easily found in the complexity of the groups in which modern children grow up. An analogy to the primitive simplicity of conduct is to be found in the absence of errors in the speech of primitive children. If a language is pure and has no foreign idioms and if the children are not in the company of those who speak other languages or dialects, then it is probable that they will make no errors in grammar. My own observations confirm this conclusion. During my residence among the Congo tribes no child was ever heard by me to make a mistake in grammar. The influences are all homogeneous, the stimuli are all consistent, and there is no occasion for an erroneous reaction in the matter of the vocal gesture called language. The language is almost perfect in its regularity. The real phenomenon that demands explanation is that a mistake should be made at all, for the normal method of response will be to adopt the conventional words if these are received from a consistent source.

It is confidently believed that a careful report of the facts and conditions among present-day savages would establish the non-existence of the punishment of children among many of them. V. Stefansson says: "We count it as one of the chief triumphs of the four-year expedition of the American Museum of Natural History to the Eskimo that we discovered why it is that children are not punished; for such immaterial things is the money of scientific institutions expended!"<sup>4</sup> He then gives the two previous explanations that have been assigned, namely, that the children are so good that they do not need it, and secondly, that the Eskimos are so fond of their children that they cannot bear to punish them. Both of these explanations are rejected in favor of the theory that the belief of the natives that every child is the reincarnation of the spirit of an honored ancestor is the real explanation of the forbearance of the parents under circumstances which the white man often found very

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<sup>4</sup> V. Stefansson, "My Life with the Eskimo," p. 395.

trying. Whether this explanation points out the real cause of the phenomenon or whether it was a theoretical formulation which grew up to account for the practice and to justify it, is not important for this discussion. The main thing to observe is that there is no punishment of children among these people. With the coming of the white man, the group will be more and more subject to outside influences and there will be increasing opportunities for tension; but during the ages when they were living their own life, there was no thought of punishing the children.

Stefansson also deals at length with the subject of the immense power of public opinion in the Eskimo society. Resort to force is so rare as to be almost negligible. They are a unit, rule is not by force, though there is always a leader. The authority of the leader depends, however, not on his strength, but on the extent of his influence with the larger group.<sup>5</sup>

Absence of punishment is also the characteristic of the Japanese system of governing children. President Sato of Sapporo College in a conversation with the writer, says that the Japanese do not punish their children even yet, although the foreign influences are very pronounced at the present time in Japan. But for a long time, the system was homogeneous and unified and the momentum of it endures till the present. It is true that President Sato considers that the Japanese are too indulgent with their children and that they should exercise more careful control over them, but the fact of the absence of a system of physical punishments for children is highly significant.

The solidarity of the truly primitive group in this respect can, therefore, hardly be overstated. There is no remedy for an infraction of custom by a member of a group. No physical force is used or can be used. The whole of the remedy is vocal disapproval, reproach, and scorn. But for reasons that will later appear in this discussion, it is contended that scorn and ridicule are the most powerful

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<sup>5</sup> *Op. cit.*, p. 365.



weapons that are available in the service of conformity.<sup>6</sup>

This much is, therefore, clear from the discussion so far. Punishment could not have arisen within the early group owing to the absolutely social character of their early organization and the absence of physical force from their methods of dealing with each other. It is recognized that offences might occur and did sometimes occur which would be so serious as to dissolve the bonds entirely, but as will be seen, such a situation was met by a mode of reaction that is not properly called punishment.

How, then, did punishment arise? If it did not begin inside the group in some sort of formal infliction of penalty or violence of force, did it originate in the reactions against the enemies of the tribe? This question will now be considered.

## II.

The really primitive group, we have seen, was probably bound together by ties of an instinctive nature which made it impossible to proceed in any way against one of the number for an offence that should work injury to the offender. The opposing theory finds the origin of punishment in the wars with the enemies of the tribes. Westermarck thinks that the instinct of resentment, in most cases "sympathetic resentment," but always some strong emotional state of mind, is the key to the understanding of the punishing reactions. Hobhouse finds a cognitive basis for the origin of punishment in the concepts that are formed when the evil effect of the offence is observed. Steimmetz traces it to the expansion of personality that follows the retaliation against an affront.

But it seems quite unnecessary to go beyond the simple, inherited reaction of all gregarious animals of the carnivorous type, all females with young, and even insects of

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<sup>6</sup> The Roman Assembly of the Tribes could not inflict death, only a fine, for the life of a Roman was sacred inside the walls. (Maine: *Anc. Law*: 375) *But the military court could inflict the death penalty.*

the social kind, as bees and wasps. There is a natural, inherited reaction, of defence against the attack of a stranger or an enemy. The savage fights anyone from the outside who has attacked his child or his brother or his father or any of his kindred or clan, and does so just as a hive of bees or a nest of hornets responds to a disturbance of a hostile nature. The reaction is not due to reflection, does not arise out of concepts of justice or right or property, and is not due to any antecedent feeling. The beginning of the whole process is this reaction of a protective character absolutely essential to the preservation of the group, which takes into account only the dangerous character of the enemy and the need of securing his annihilation.

The fixed character of the primitive group is one of its most striking characteristics. In general, it is almost true that the only way to become a member of the group is to arrange to be born into it. There is, to be sure, a natural tendency toward the enlargement of the social group, but for the primitive man, even the nature peoples of the present day, it is often true that the whole world is divided into just two classes, namely: kin who cannot become enemies, and enemies who can never become kin. The former are never liable to punishment for reasons shown, and the latter are equally exempt from *punishment* because they are the object of *attack in war*.

The attack on an enemy or a stranger who offends is often made when the dictates of prudence or self-interest would make another course of action desirable, but the tribe is without any other alternative. Just as a rattlesnake exhausts his venom in futile strikes and is captured with impunity, so many a native tribe would have been able to maintain itself and get ahead, if it had been able to take a cool and rational attitude toward attacks, but this is not possible. The attack is made because there is nothing else to do.

Just what punishment is will presently appear, but it is evident that an attack which ceases only with the annihilation of the enemy, which is without any relation to the

nature or gravity of the offence committed, and which is directed towards those who are thought of in the most abstract way as enemies, is not yet the sort of reaction that we call punishment. It may be called a war, a feud, a vendetta, or a foray, but the disregard of consequences, the lack of measure or restraint, the wholly impersonal relation that is assumed, marks the phenomenon off from true punishment.

The literature of feuds and the vicarious infliction of suffering on the innocent members of the group is very complete, but the following personally observed circumstance will bring out the facts that it is desired to emphasize in this connection. A native woman of the Upper Congo secured the remission of the payment of dowry and returned in a perfectly regular and legal manner to her father, but passed with unseemly haste to the home of the co-respondent. The deserted husband, in a fit of jealousy, came from his distant village with a party, and proceeded in the darkness to fire the hut in which the couple was sleeping, but, as it was afterwards explained, included some near-by huts because the huts of the enemy were not very well built. The next morning saw a counter foray into the villages of the house-burners, but this attack was directed against a remote portion of the enemy's village in order that they might be taken by surprise as the news of the affair had not spread. Accordingly, an approach was made and a volley fired at close range, killing a man and a woman who did not know that there was any trouble between the two communities. After this, slaughter went on merrily for several months.

Now, it is significant for this discussion to note that the group has no censure for those who are the occasion for trouble of this kind. The woman whose action caused the death of several of her tribe is not reproached, even by those who are the heaviest losers in the fighting. The actions of the quarrelsome members of the tribe, in so far as they affect outsiders, are accepted unquestionably and the whole tribe joins in the natural, normal, and often

joyously exciting reaction called out by the instinct of pugnacity. Nor is there any blame for the enemy. He is conceived as doing his part. He is not supposed to take into account the interest of a group other than his own; he is thought of in the most abstract fashion as a target and source of danger, game and hunter in one, and with nothing even resembling a fellow-feeling.

There was a little Congo lad who owned a chicken which one day appeared with only one leg because the boy felt obliged to practice economy by eating one leg and letting the rest of the fowl wait! This killing on the installment plan is hardly to be thought of as cruelty, but is due to the fact that the fowl is viewed from the point of view of food alone. The lad would as soon have thought of showing mercy to a potato or a mango, as to a chicken; for mercy and consideration belong to the members of your own family and are unthinkable in any other situation. The cannibal tribes, which are not the lowest but represent the highest development among the peoples of the Congo valley, often stick the living victim full of bambo skewers to preempt portions of the meat before the slaughter!

A social attitude toward a member of another group is, therefore, unthinkable. A snake, a leopard, a slaughtered sheep, or a crushed worm is not more abstractly treated. It is felt that an attitude of this sort cannot by any stretch of meaning be taken to include punishment.

The conclusion is, therefore, that there is no punishment of any one in a thoroughly primitive society. The whole universe is divided into two classes for the theoretically primitive savage, and these are the members of his own group whom he does not ever think of striking or punishing in any way, and the rest of the world who are to be watched carefully at all times but who are to be destroyed if they are found in an attitude of attack.

A thoroughly analogous situation is found in the attitude of civilized nations in their international relationships. The citizens of a foreign country, so long as they remain on their own territory, are not subject to punishment by

any other nation whose citizens may have suffered injury. If an expedition is made across the border and damage is done the goods and persons of another nation, there is no punishment by the nation that receives the injury. Any attempt at redress by a foreign nation inside our territory is war. There are only two courses open to an offended people in such a case. They can send an attacking force across the border to avenge the wrong, but this is not punishment, it is war. The only other course open to the injured government is to appeal in a friendly way for the government of the offenders to take cognizance of the offence and do justice. But clearly here the injured nation is not punishing anyone. They may appeal to another to punish, but this appeal is a friendly and social act. Punishment must, therefore, be administered by the group to which the offender belongs. But we have seen that when the group is homogeneous, it is impossible for the category of punishment to have any place. There are groups organized within civilized society which are so thoroughly social that there is no thought of punishment within the circle, as for example, a college faculty or a social club.

### III.

For a situation which would make the attitude of formal punishment possible, we must have a society that has grown so complex that there are varying degrees of relationship and of fellow-feeling. This is, to be sure, the natural result of a prosperous community for, as populations multiply and migrations are rendered necessary by part of the company in order to find more room, it is inevitable that some distant tribes should also be distant kin and the reaction of enmity would tend to become modified. Indignation would be present, but it would be tempered by other feelings, in case an offence should be committed. The presence of slavery as an institution is also one of the early manifestations of complexity. Exogamous marriages also imply alliances with otherwise hostile tribes and these

alliances are often of the most serious and binding nature. Also there are numerous temporary alliances for barter and for protection.

In such a complex situation it would be a rare case in which an offender would not have some friends within the very group that is concerned. Should two slaves, for example, have a serious quarrel, there might be nothing in the way of a battle to the death if they were of different tribes. But the owner of the two would naturally wish to save his property. In case of a federation of villages, the leaders would naturally be in favor of an amicable settlement of feuds between constituent members of the larger organization. There will be those in such a complex group who would wish to see the offender destroyed, that is, they would take the part of an enemy. There would also be those who would wish to have him escape entirely and who would, therefore, defend his cause. And there is necessary in any real punitive situation an impartial umpire who has interests on both sides.

Here, then, is the solution to the problem of the origin of punishment. So long as there are just two groups in the social world of the savage, no punishment could take place, but when there are three or more groups in his world, the attitude of formal punishment becomes a natural one. There is the group to which the offender belongs, the group which he has attacked, and a third which is relatively neutral and has interests in both.

Our institutions of punitive justice exhibit this phenomenon quite accurately. The criminal is the expression of a group and is normally quite loyal to the group ideals and the code of his clan. This group is represented before the bar by counsel, appointed, if necessary, by the state itself, and the counsel for the defence is interested in making such a showing in the trial of the cause that the rights of the defendant will be fully protected.

There is also the group which the prisoner has attacked, represented by the prosecuting attorney whose sole task it is to paint the offence in the blackest colors, or, in other

words, to represent his enemies and to destroy him, if possible. The fact that he is said in our legal procedure to represent the "people" should not blind us to the fact that there is also a third group necessary in the situation, represented by the judge and the jury. These stand for the great body of those who are not directly concerned and who are, in reality, attempting to arrange the conflicting claims. The jury is supposed to have no interest in the case and preferably to have no knowledge of the matter, to be, therefore, wholly disinterested and of another social group entirely.

According to this discussion, punishment is a practice that has arisen out of group activity and owes none of its origin to private vengeance or the rule of force within the group. Punishment is the expression of the clashing of groups; with a "buffer-group" to lessen the shock. It is a phenomenon of social psychology and can only be approached intelligently from the social point of view.

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